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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 972

UNITED STATES OF AMERICA, APPELLANT

v.

PROVIDENT NATIONAL BANK, AND CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellee, Comptroller of the Currency, moves that the judgment of the District Court be affirmed on the grounds that the questions raised by appellant are not new or novel and are so insubstantial as not to warrant further argument.

STATEMENT

On December 6, 1965, Provident National Bank and Central-Penn National Bank, pursuant to the Bank Merger Act of 1960, 12 U.S.C. § 1812(c), filed an application with the Comptroller of the Currency of the United States (hereinafter referred to as the Comptroller or Intervenor) for permission to merge. This was granted on March 4, 1966 under the standards of the new Bank Merger Act of 1966, 12 U.S.C. § 1828(c), hereinafter referred to as BMA-66. Following said standards of BMA-66, the Comptroller issued his opinion on March 31, 1966. This opinion was rendered after careful consideration of: extensive material submitted by the banks in support of the application to merge; opinions requested and received from the Federal Reserve Board and the Department of Justice, Antitrust Division; receipt of reports of bank examiners who conducted detailed examinations of each of the two banks; and, the reports of the Regional Comptroller of the Currency.

The Comptroller's opinion approving the merger stated, in substance, that the anticompetitive effect of the proposed merger would be insignificant but, in any event, any anticompetitive effects of the proposed merger would clearly be outweighed in the public interest by the desirable results of the merger in meeting the convenience and needs of the community to be served. Among other things he also contended that the proposed merger would have a favorable effect on competition rather than an adverse effect.

The Department of Justice filed suit on April 1, 1966, alleging a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, only. No reference was made at all to BMA-66. Later the Comptroller intervened and

Answers were filed. On August 11, 1966, the Comptroller moved to dismiss the Complaint on the grounds plaintiff failed to state a claim upon which relief could be granted by not filing under the proper statute and alleging a violation thereunder. Defendant banks also filed a motion to dismiss on August 22, 1966.

After filing of briefs and argument the District Court denied the motion to dismiss stating it did not sustain the position of the Department of Justice that it was entitled to sue under Section 7 of the Clayton Act. However, under the modern theory of notice pleading the court need only take judicial notice of the relevant statute (BMA-66), and federal acts are a proper subject for judicial notice. Therefore, in effect, the court amended the Complaint to charge a violation of BMA-66, instead of Section 7 of the Clayton Act. The Court also stated, in its opinion, that it was not necessary at that time to decide the question of who had the burden of proof under BMA-66.

On November 4, 1966, following the receipt of briefs and argument, Judge Clary ruled on the burden of proof question holding that plaintiff's only action lies within the ambit of BMA-66 which allows only one solution:

> Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to prima facie establish (1) that there are anticompetitive effects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer con-

trolling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.

If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof.

Once the Banks and the Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger.

In ruling on the weight to be given the findings of the Comptroller, the Court stated the substantial evidence rule should not apply. It distinguished the instant case from *United States* v. *Crocker-Anglo National Bank et al.* (N.D. Cal., Civil No. 41808) as there was a public, evidentiary hearing in the *Crocker* case. The Court found *First National Bank of Smithfield, North Carolina* v. *Saxon,* 352 F. 2d 267 (4 Cir. 1965), to be analogous to the instant case, thus allowing the Comptroller to act at his discretion.[1] Therefore, while the substantial evidence rule would apply in the

[1] In the *Smithfield* case the Court at p. 272 said:

> If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion.

Crocker case a different application should be made in this case. The Court held:

> The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in *Crocker*.
>
> Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.

Subsequent to the Court's ruling on the burden of proof plaintiff filed a summary of evidence and statement of position taking the adamant position it would not accept the burden placed on it of attempting to prove a prima facie violation of BMA-66.[2]

After receipt of plaintiff's statement of position, motions for final judgment were made by defendant banks and the Comptroller. A hearing on said motions was held on December 12, 1966, and on December 29, 1966, Judge Clary handed down his opinion dismissing the complaint with prejudice and ordered the stay to be lifted not earlier than January 18, 1967.

Thus, the only questions that could possibly be brought before this Court are: (1) whether the Department of Justice must plead BMA-66 instead of Section 7 of the Clayton Act in attacking a bank merger; (2) which party has the burden of proof under BMA-66; and (3) the meaning of review de novo.

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[2] Plaintiff's summary of evidence and statement of position is attached to defendant banks memorandum in opposition to plaintiff's application for a Stay, as appendix 4.

ARGUMENT

Appellant Concedes BMA-66 Governs

In this case, unlike their position in *United States* v. *First City National Bank of Houston, No. 914,* the appellant does not raise the question as to whether Section 7 of the Clayton Act or BMA-66 should be pleaded in attacking a bank merger. The "Question Presented" in Appellant's jurisdictional statement is:

> Whether the Bank Merger Act of 1966 requires the government in an antitrust suit challenging a bank merger to establish not only that the merger may substantially lessen competition but also that its anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

Additionally in reemphasizing its position, appellant states at the end of its statement (p. 7):

> We emphasize there that the question presented, while nominally a narrow one of burden of proof, in fact involves the fundamental issue whether an antitrust action attacking a bank merger is basically a proceeding in review of the action of the approving banking agency.

It is therefore quite obvious that appellant concedes that the proper statute to plead in attacking this bank merger is BMA-66.

Burden of Proof Is Clearly on Appellant

An important question before this Court is the one of burden of proof. The legislative history and BMA-66 itself clearly show the Department of Justice has not only the burden of pleading but the burden of

proving all the standards set out in the Act. This question is conclusively answered by the long established principle that where the statutory standards are contained in one general clause and a proviso is contained as an intrinsic part of that enabling clause the plaintiff must allege and prove the standards and negate the proviso.[3]

This principle is at least as old as *United States* v. *Cook*, 84 U.S. 168 (1872). It is a long established rule that has never been overturned. In the Cook case this Court stated (p. 173):

> Where a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the langauge defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the

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[3] The general clause and proviso involved in this case are contained in BMA-66 Section 5(B), (12 U.S.C. § 1828(c)), which reads:

(5) The responsible agency shall not approve—

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

matter contained in the exception is matter of defence and must be shown by the accused.

See also, *United States* v. *Cruikshank et al.*, 92 U.S. 542, 558 (1875); *United States* v. *Behrman*, 258 U.S. 280 (1922); and *Seese* v. *Bethlehem Steel Co.*, 74 F. Supp. 412, 416 (D. Md. 1947), aff'd, 168 F. 2d 58 (4th Cir. 1948).

United States v. *King and Howe*, 78 F. 2d 693 (2d Cir. 1935), relied on by appellant, is not inconsistent with the rules in *Cook*. In Appellant's jurisdictional statement[4] it quotes from *King* and *Howe* as follows: "that where a party relies upon a statute containing a general clause followed by an exception or proviso in a subsequent substantive clause, such exception is a matter of defense and need not be negatived." Said case concerned Section 7 of the Food and Drug Act, 21 U.S.C. § 8, which contains a general clause followed in subsequent provisions of the statute by an exception, 78 F. 2d 695. However, in BMA-66 (Sec. 5(B)) the standards are contained in one general clause and a proviso is contained as an intrinsic part of that enabling clause. Had the statute, referred to in *King* and *Howe*, contained the exception within the same general clause, the Department would have been required to negate the exception in its pleadings and proof in accordance with the established principles set out above.

Additionally, there is another long established principle of law that when a plaintiff challenges the valid-

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[4] Jurisdictional Statement in *U.S.* v. *First City National Bank of Houston, et al.* (at page 7), which was incorporated by reference by appellant.

ity and presumptive legality of an administrative decision, it must bear the burden of overcoming the presumptive legality of that decision. In *Goldberg* v. *Truck Drivers Local Union No. 299,* 293 F. 2d 807, 812 (6 Cir. 1961) cert. den., 368 U.S. 938, the Court said:

> In the absence of proof to the contrary, there is a presumption of regularity in the proceedings of a public officer. The burden is upon the party complaining to show otherwise.

This recent case is in accord with *United States* v. *Chemical Foundation,* 272 U.S. 1, 14-15, (1926) and *United States* v. *Jones,* 176 F. 2d 278, 282 (9 Cir. 1949).

Therefore, this particular question, burden of proof, long settled, is not new or novel and jurisdiction should not be noted in this case on such an established principle.

Review De Novo

Appellant asserts, on page 7 of its jurisdictional statement, that the burden of proof question also embraces the issue whether an antitrust action attacking a bank merger is a proceeding in review of the Comptroller's decision. This is true; and to the extent that if a review *de novo* is to be made rather than a trial *de novo,* the principle of law on burden of proof just stated above controls. It is the Comptroller's position that in an action brought by the Department of Justice attacking a bank merger there should be a review *de novo* of the decision or opinion of the Comptroller of the Currency by the Court. (Apparently the appellant still subscribes to its position that BMA-66 created no substantive changes and therefore an action attacking

a bank merger approved by the Comptroller must be subjected to a trial *de novo* by the Courts.[5])

The specially constituted three-judge court in *United States* v. *Crocker-Anglo National Bank,* 1966 Trade Cases, Par. 7,898 (N.D. Cal. 1966) delivered a well-reasoned opinion on the question of whether the court should review *de novo* the decision of the Comptroller and to what extent the review can be *de novo.* In the *Crocker* case the court came to the conclusion that BMA-66, including the legislative history of said Act, contradicted the position of the Department of Justice. After discussing the legislative history and certain provisions of BMA-66 (pp. 83,151-83,152), the court said on p. 83,153:

> Perhaps the most conclusive evidence of the fact that this Act alters the previous rules comes from a comparison of the language of this statute with what the Supreme Court said in the Philadelphia case, namely, that a bank merger such as that one "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." Section 18(c)(5), quoted above, expressly requires a consideration of similar factors thus rejected in Philadelphia.
>
> This statute makes a further alteration in the nature of the proceeding now before us. After

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[5] See *United States* v. *Third National Bank of Nashville et al.,* Par. 71,934, 1966 Trade Cases, p. 83291 when the Court said in part:

> The plaintiff's restrictive interpretation of the 1966 Amendment finds little support either in legislative history or in the text itself. On the contrary, both legislative history and the textual provisions of the Amendment strongly indicate that it was the intent of Congress to effect substantial changes in existing anti-trust law relative to bank mergers as enunciated in the *Lexington* and *Philadelphia* cases. *United States* v. *Crocker-Anglo National Bank, et al.* supra.

> providing for the time of commencement of an action brought under the antitrust laws arising out of a merger transaction, § 18(c)(7)(A) stipulates: "In any such action, the court shall review *de novo* the issues presented." Returning now to the provisions of § 2(c), requiring this court to "apply the substantive rule of law set forth in § 18(c)(5)", and to § 18(c)(7)(B), reciting that in any judicial proceeding attacking a merger transaction approved under paragraph 5, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph 5," *it seems clear that what we are now called upon to do is to review a decision and determination of the Comptroller of the Currency.* (Emphasis supplied)

Also, p. 83,155, the Court stated:

> . . . If we look to the purpose beyond the statute and to the policy of the legislation as a whole we must conclude that Congress has framed an Act which contemplates, as an important part thereof, provisions for review of the Comptroller's action.

and p. 83,156:

> It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term *"de novo"* does not speak of a trial *de novo* but of a review *de novo*.
>
> The legislative scheme here, in our view, resembles that which is elaborately spelled out in those sections of the Interstate Commerce Act which were discussed in the recent case of *Sea-*

board Air Line Company v. *United States,* 382 U.S. 154.

Chief Judge William E. Miller in his ruling in *United States* v. *Third National Bank of Nashville, et al.,* Par. 71,934, 1966 Trade Cases p. 83,286, 83,289-83,290, supported the ruling of the three judge court in the *Crocker* case as to the review *de novo* question and the scope and nature of judicial review to be made of the Comptroller's decision.

Chief Judge Clary, in ruling in the instant case on the weight to be given the opinion of the Comptroller in approving the merger distinguished the *Crocker* case from the instant case. In *Crocker,* the Comptroller's findings and opinions were based on a public evidentiary hearing. In the case at bar there was no such proceeding.[6] He stated in his oral decision dated November 4, 1966, (a copy of which is attached to Appellants' jurisdictional statement as Appendix A, II).

> The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in *Crocker.*
>
> Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comp-

[6] In the instant case the Comptroller considered the material submitted by the banks; the advisory opinions of the Federal Reserve Board and of the Department of Justice, Antitrust Division; the reports of the bank examiners and the reports of the Regional Comptroller.

troller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.

Among the cases supporting Judge Clary's ruling is *First National Bank of Smithfield, North Carolina* v. *Saxon*, 352 F. 2d, 267 (4 Cir. 1965). In *Smithfield*, the Comptroller approved a new branch without a hearing. In that case the Court said (p. 272):

> We have said the Comptroller did not act arbitrarily in not allowing a hearing. However, a necessary consequence of his unilateral procedure is that the facts on which the Comptroller presumably acted should not be given the preferred position accorded by the substantial-evidence rule. The rule would declare them indisputable if some reasonable basis for them may be found in the evidence. Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard. Hence, there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision. . . . . If after the court has made its findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's.

See also, *United States*, ex rel. *Weddeke* v. *Watkins*, 2 Cir., 166 F. 2d 369, 373, certiorari denied, 333 U.S. 876; *Northwest Bancorporation* v. *Board of Governors of the Federal Reserve System*, 303 F. 2d 832 (8 Cir. 1962); and, *First Wisconsin Bankshares Corporation* v. *Board of Governors of the Federal Reserve System*, 325 F. 2d 946, 948 (7 Cir. 1963).

The statement of this Supreme Court in *Securities and Exchange Commission* v. *Chenery*, 332 U.S. 194

(1947) is a guide to the judicial function as it applies to review of the actions of an administrative agency (p. 209):

> The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. See *Republic Aviation Corp.* v. *National Labor Relations Bd.*, 324 U.S. 793, 800, 89 L. ed. 1372, 1377, 65 S. Ct. 982, 157 ALR 1081. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.

This Court also stated p. 208:

> The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters. See *United States* v. *Lowden*, 308 U.S. 225, 84 L. ed. 208, 60 S. Ct. 248; *Interstate Commerce Commission* v. *Railway Labor Executives Asso.*, 315 U.S. 373, 86 L. ed. 904, 62 S. Ct. 717.

CONCLUSION

The Comptroller believes it has shown that the question presented by the appellant is not new or novel and does not present a question substantial enough for consideration by this Court. The issues raised by the question have already been determined by this Court and/or various Circuit Courts of Appeal.

It is therefore requested that the judgment of the District Court be affirmed.

Respectfully submitted,

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Office of the
Comptroller of the Currency.

JANUARY, 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 914

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST CITY NATIONAL BANK OF HOUSTON, SOUTHERN NATIONAL BANK OF HOUSTON, AND WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY

REPLY MEMORANDUM FOR THE UNITED STATES

Appellees suggest that this case merely raises the question whether the government must allege in its complaint that a merger's anticompetitive consequences are not outweighed by considerations of "convenience and needs."

We disagree.

First, the trial judge clearly dismissed this case because he believed that the United States was required to assume the burden of proof on the "convenience and needs" issue. The court stated:

> I understand the cases to hold the burden to be on the plaintiff to allege and *prove* an anti-

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> competitive result of the merger and further that that is not outweighed by the convenience and needs aspect of the matter.
>
> I think the Department of Justice has continued for reasons of its own to adopt a contrary interpretation. * * *
>
> I have no desire to dispose of a case of this kind on a question of pleading. * * * [Emphasis added.]

Second, the appellee banks have already recognized that the district court's holding concerned the burden of proof and the very nature of the judicial proceeding, and not mere questions of pleading. For example, their Memorandum in Opposition to Plaintiff's Application for an Injunction Pending Appeal, filed in this Court on December 21, 1966, argued (p. 6):

> The trial court held that a rebuttal of the Comptroller's finding, that the benefit to convenience and needs of the community to be served clearly outweighed the anticompetitive effects, was an essential element of the proof of violation in the court's review of the issues determined by the Comptroller.

(See Reply of the United States to Memorandum of Defendants Opposing Stay in *United States* v. *First City National Bank of Houston*, No. 914, October Term 1966, p. 1.)

Appellees contend that by this appeal the government is litigating the issues in the case piecemeal. But even if the government had amended its complaint and proceeded to trial on the merits, that would not necessarily have expedited the ultimate determination of the case. For if the district court upheld the

merger on an erroneous legal standard and the government successfully appealed, a second trial would likely have been necessary. In short, this appeal will avoid, not create, needless litigation.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967